

Senate Bill 402
February 19, 2009
Presented by Bob Lane
Senate Judiciary Committee

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 2/19/09
BILL NO. SB402

Mr. Chairman, members of the Committee, I am Bob Lane, Chief Legal Counsel of the Montana Department of Fish, Wildlife & Parks (FWP). FWP opposes SB 402.

The intent of this bill is to reverse the recent Montana Supreme Court decisions that held the I-143's (November, 2000) prohibitions on paid captive elk "hunts" and prohibitions on the transfer of alternative livestock (game farm) licenses were not taking of private property without compensation.

There are two specific points that FWP will emphasize about this bill. First, the key language on page 2, lines 9 through 12 essentially could establish that any statute or regulation that impacts, apparently in any way, a business or property would require the state or local government to compensate for the restrictions on the operation of the business or the use of property. This would have a dramatic and chilling impact on the ability of the legislature, counties, and cities to regulate the conduct of businesses and set community or state standards of conduct. The new subsections (2)(a) and (2)(b) to MCA 70-1-104 are so open-ended that the cost of regulations impacting business would simply be enormous.

The second point is that SB 402 is intended to change the constitutional analysis of regulatory takings in a completely one-sided approach. Under present law, as affirmed by the Montana Supreme Court in the Kafka and Buhmann cases, there is a balancing test to determine when a regulatory taking has occurred that requires compensation. Under the Penn Central analysis of whether there is regulatory taking, a court is to balance the economic impact of a regulation on a property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, the character of the governmental action, and whether the regulation has an unduly harsh impact on the owner's use of the property. The Montana Supreme Court in Kafka and Buhmann determined there was not a regulatory taking based on the Court's analysis of the above factors.

In contrast, SB 402 would replace a balancing analysis with a single test: If there is an economic impact then the legislature or county or city must compensate the affected businesses for any and all impacts to all aspects of a business including loss of future profits.

The result is easy to understand. All government regulation, no matter its purpose or benefits to society as a whole, would come up with a potentially enormous economic price tag.

If the law on regulatory takings is to be codified, the limited approach of SB 402 does not do the job because it completely ignores all the other critical factors necessary to balance the value of laws and regulations with impacts on private businesses.